No. 658

Office - Supreme Court, U. S.
FILED
NOV 7 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1944

ABRAHAM JESKOWITZ,

Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of UNION FABRICS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND MOTION TO DISPENSE WITH PRINTING AND SERVICE OF THE RECORD

ARCHIBALD PALMER,
Attorney for Petitioner.

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Statement of Facts 2

Reasons Relied On for the Allowance of the Writ 7

Specifications of Error to be Advanced 9

Summary of Argument 10

Argument 11

POINT A—There is a conflict of authority within the Circuit Court of Appeals for the Second Circuit on the question of when a trustee may rely on a presumption of continued possession resulting in the suggestion by the Circuit Court of Appeals for the Second Circuit, in its recent decisions, that this question be reviewed and finally determined by the Supreme Court of the United States 11

POINT B—There is a conflict of authority on the question of presumption of continued possession among several circuits on the question of law involved in the case at bar, and there should be a unanimity of opinion among the various circuits with regard to this question 17

POINT C—The Trustee did not offer any proof to show that petitioner had, at the date of the turnover order, any property of the bankrupt, although the law requires that the Trustee establish all the elements of a turnover proceeding by clear and convincing proof 20

CONCLUSION 21

Motion to Dispense with Printing and Service of the Record 23

CASES CITED

PAGE

Boyd v. Glucklich, 116 F. 131 21

Danish v. Sofranski, 93 F. (2d) 424 ..... 8, 15, 16

Epstein v. Steinfeld, 210 Fed. 236 21

H. Magen Co., In re, 10 F. (2d) 91 18

Marin v. Ellis, 15 F. (2d) 321 ..... 8, 18

J. L. Marks & Co., In re, 85 F. (2d) 8, 18

Oriel v. Russell, 278 U. S. 358 ..... 17, 20, 21

Pinsky-Lapin & Co., In re, 98 F. (2d) 776 ..... 8, 16, 18

Robbins v. Gottbetter, 134 F. (2d) 843 ..... 8, 14, 19

Samel et al. v. Dodd, 142 Fed. 68 ..... 8, 19

Schoenberg, In re, 70 F. (2d) 321 ..... 8, 16

Seligson v. Goldsmith, 128 F. (2d) 977 ..... 8, 9, 15, 17, 19

Steinreich Associates, Inc., 83 F. (2d) 254 18

STATUTE CITED

Bankruptcy Act:

Section 21-L 11

Supreme Court of the United States

OCTOBER TERM 1944

ABRAHAM JESKOWITZ,
Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of UNION FABRICS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of ABRAHAM JESKOWITZ prays that a return of certiorari issue to review the order and decree of the Circuit Court of Appeals for the Second Circuit entered on the 8th day of August, 1944 (R. 85a, 86a) affirming an order of the District Court of the United States for the Southern District of New York dated the 6th day of May, 1943 (R. 5a). The order of the District Court affirmed the order of the Referee in Bankruptcy dated February 23, 1943 (R. 20a).

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 77a) is reported at 144 Fed. (2d) 39. An opinion was written by Circuit Judge Augustus N. Hand and a concurring opinion was written by Circuit Judge Jerome N. Frank.

The District Judge rendered an opinion in affirming the order of the Referee in Bankruptcy (R. 7a).

The Referee in granting the application of the Trustee handed down a written decision (R. 25a).

Jurisdiction

The decree of the Circuit Court of Appeals was entered on the 8th day of October, 1944 (R. 85a).

The jurisdiction of the Court is under Section 24 (c) of the Bankruptcy and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement of Facts

The petitioner is the president of the Union Fabrics, Inc. On the 20th day of December, 1939, an involuntary petition in bankruptcy was filed against the Union Fabrics, Inc. in the office of the Clerk of the United States District Court for the Southern District of New York. A turnover proceeding was instituted by the Trustee in Bankruptcy on or about October 25, 1940, charging the petitioner herein, as president and sole stockholder of Union Fabrics, Inc., with having failed to account for merchandise valued at $69,921.24, the proceeds of a ring amounting to $875 and the following books and papers alleged to have been under his control: journal for the year 1938; general ledger for the year 1937; inventory sheets for the years 1937, 1938 and 1939, and all purchase invoices for the year 1937. Abraham Jeskowitz appeared and interposed an answer denying the material allegations of the petition. Hearings were commenced on January 27, 1941, and continued until October 25, 1941, by which time there had been adduced 315 pages of testimony. Abraham Jeskowitz, who had no legal training, because of lack of funds had no alternative but to conduct his own defense to the proceedings up to

September 24, 1941, when he was able to retain Chester A. Lessler, Esq., to conclude the hearing on the original petition. On October 25, 1941, an amended petition was filed by the Trustee directing Abraham Jeskowitz to show cause why he sould not turn over to the Trustee 187,363⅛ yards of silks and other textiles, the proceeds of the ring, and the books and records as referred to in the original petition. The amended petition was predicated upon the theory that the Union Fabrics, Inc. had on hand on January 1, 1939, merchandise of the cost or value of $194,785.05 and upon the further theory that the merchandise was sold at a price not less than cost during the period between January 1, 1939, and September 28, 1939 (R. 31a). Additional testimony was taken based upon the amended petition and answer to the amended petition, which denied the material allegations of said amended petition (R. 43a). Thereafter the Referee handed down a memorandum decision in which the Referee accepted the figure of $197,785.05 as representing the cost of the merchandise on hand on January 1, 1939, and the contention of the Trustee that the merchandise sold during the period January 1, 1939, to September 28, 1939, was sold at not less than cost in the sum of $322,587.36. This contention of the Trustee was accepted by the Referee by reason of Section 21-L of the Bankruptcy Act, upon the theory that the missing books and records were necessary to determine the cost of the merchandise sold by the Union Fabrics, Inc. during the period from January 1 to September 28, 1939, were not made available to the Trustee in Bankruptcy (R. 20a). Under the original petition, which the Trustee abandoned, the missing records may have been necessary for the Trustee's purposes but by the amendment of the petition to provide for the opening figure as of January 1, 1939, it is the petitioner's contention that the missing records were not necessary and that the Trustee had in his possession, at the time of these proceedings, all of the books and records from which the cost of the sales during the period January 1, 1939, to September 28, 1939, could be ascertained.

Testimony was introduced on behalf of petitioner that the Union Fabrics, Inc. was a corporation formed in 1937 and was in the business of converting rayon and silk fabrics with offices in the City of New York. Said corporation had previously taken over the assets and liabilities of a corporation known as Union Silk Mills, Inc., which was jointly controlled by Abraham Jeskowitz and Louis Berkman. The formation of the new corporation was due to the withdrawal of Louis Berkman and the sale of his stock to Abraham Jeskowitz, who took over the entire assets of the Union Silk Mills, Inc. at a price arrived at through an agreement between the parties (R. 25). Abraham Jeskowitz continued the business as sole owner and manager with the same inventory, assets, liabilities and records, and continued in business until September, 1939. In September, 1939, the Union Fabrics, Inc., was forced to make an assignment for the benefit of the creditors because of the financial condition of the business. Arbaham Jeskowitz and his witnesses offered testimony to the effect that no piece goods of any kind was ever withdrawn from the corporation except in the regular course of business and that entries in connection with all sales had been made in the books and records of the Union Fabrics, Inc., and that Abraham Jeskowitz had made no withdrawals from the Union Fabrics, Inc., except in the regular course of business and only withdrew such moneys as he was entitled to and for which a record was duly made (R. 61 to 64, 70 to 74). The Union Fabrics, Inc. used, in the main, the same type of bookkeeping as was used by its predecessor corporation and carried forward the identical perpetual inventory used by the Union Silk Mills, Inc. for a period of five years prior to the incorporation of the bankrupt firm. This inventory book was continued where the old corporation left off with its many errors and omissions. These perpetual inventory books were used as a basis for arriving at one of the trustee's theories in his petition for the turnover (R. 35A). The Referee however accepted

the figure of $194,785.05 as representing the cost of the merchandise on hand on January 1, 1939, even though evidence was offered to show that there were many errors and omissions totaling approximately 113,000 yards of merchandise in the inventory record. The Referee applied Section 21-L of the Bankruptcy Act and considered the merchandise sold during the period January 1, 1939 to September 28, 1939, at not less than cost even though the trustee had on hand the sales book, the perpetual inventory book and the dye book as well as the purchase invoices for the years 1939 and 1938. The sales book contains an original duplicate copy of the bill given or sent to customers showing in detail the information as to when the merchandise was sold identifying the merchandise by the Union Fabrics, Inc., quality number, Union Fabrics, Inc. piece goods number, the yardage sold and the sales price. The perpetual inventory books contained the accounts of the piece goods bought and indexed by the Union Fabrics, Inc. and quality number, the mill greige goods number, dye lot number and quantity received and the quantity shipped. The dye book contains the following information: The name of the dyer, date returned from the dyer, name of the greige goods mill, greige goods quantity number, mill number, yardage sent to dyer and the finished yardage returned by the dyer. This book also indicates the shrinkage, if any, in the dye goods. It is petitioner's contention that from these records the Trustee's accountants could have ascertained the cost price of the merchandise sold. The trustee's accountant did not ascertain the cost price of the merchandise sold upon the theory that the journal for 1938, general ledger for 1937 and purchase invoices for 1937 and inventory sheets, as distinguished from the inventory book, were not available. The Referee, by accepting the testimony of the Trustee's accountant that the books from which the cost price of the merchandise sold could be ascertained were not available, applied Section 21-L of the Bankruptcy Act and placed the burden upon Abraham Jeskowitz to

establish exactly the cost of the merchandise sold during the period. Abraham Jeskowitz, who did not have moneys to retain a lawyer during the greater portion of these proceedings and conducted his own defense to the proceeding, did not have the moneys and could not retain an accountant to ascertain the cost and therefore could not offer testimony in that respect. Because Abraham Jeskowitz was unable to hire an accountant to refute the testimony of the Trustee's accountant in order to show that the books which were in the Trustee's possession were sufficient to establish cost, he was unable to show the Referee, by expert testimony of an accountant, that the Trustee did have in his possession books and records from which the cost price of the merchandise sold could be ascertained and to establish the cost of such merchandise.

The Referee therefore found that Abraham Jeskowitz did not meet the burden of proof which was shifted to him under Section 21-L of the Bankruptcy Act and made the turnover order based upon a finding that Abraham Jeskowitz had in his possession merchandise of the value of $69,921.24. This was not a finding of an actual withholding but rather a theoretical one based only upon the mathematical computations advised by the Trustee's accountant. Testimony was introduced on behalf of Abraham Jeskowitz that he never removed any property of any kind from the Union Fabrics, Inc.; that he had not withdrawn any moneys from the Union Fabrics, Inc. except in the regular course of business and except as was entered in the books and records of account; and that he did not have, either on September 28, 1939 or at any time during the turnover proceedings, any portion of the said sum of $69,924.21. The Trustee in its petition did not rely upon actual proof of possession by Abraham Jeskowitz of the sum of $69,924.21 but upon a presumption that if the moneys were unaccounted for as of September 28, 1939, then he continued forever to have possession of that money. The Referee adopted the Trustee's theory of a presumption of continued possession and without actual proof of present pos-

session rendered a decision finding present possession of the moneys in question although petitioner had testified that he never had any part or portion thereof. An order in conformity with the Referee's decision was entered on February 23, 1943.

A petition to review the said order of the Referee was filed by petitioner (R. 12a). The Referee's order was affirmed by order of the District Court on May 6, 1943 (R. 52). A notice of appeal was filed in the Circuit Court of Appeals (R. 4a). The Circuit Court of Appeals rendered a decision in which a main and concurring opinion were written (R. 79a). Circuit Judge Frank, in the concurring opinion, stated in substance that he hoped that the Supreme Court of the United States would review the question of whether a Trustee in Bankruptcy in a turnover proceeding should be allowed to rely upon a presumption of continued possession of the property and overrule precedents which fasten upon the courts an irrational rule of presumptions which are obviously contrary to the facts (R. 84a).

Reasons Relied On for the Allowance of the Writ

The lower courts erred, as a matter of law, in relying upon a presumption rather than upon clear and convincing proof, in finding that a theoretical shortage existed as of September 28, 1939.

The courts below erred, as a matter of law, in failing to hold that the Trustee was required to submit affirmative proof that the petitioner had in his possession and under his control on September 28, 1939, merchandise valued at $69,921.24, or the equivalent in cash.

The courts below erred, as a matter of law, in relying upon the presumption of continued possession, in spite of the testimony offered to refute any theoretical withholding of property, and to refute the presumption that he continued to have any property in his possession or under his control.

The decisions of *Danish* v. *Sofranski,* 93 F. (2d) 424; *In re Schoenberg,* 70 F. (2d) 321; *In re Pinsky-Lapin & Co.,* 98 F. (2d) 776; *Seligson* v. *Goldsmith,* 128 F. (2d) 977; *Robbins* v. *Gottbetter,* 134 F. (2d) 843, all decided by the Circuit Court of Appeals for the Second Circuit, and involving the question of when a trustee may rely upon a presumption of continued possession, as in the case at bar, are conflicting in doctrines of law.

The recent decisions of the Circuit Court of Appeals for the Second Circuit in substance suggest that the presumption of continued possession, which they feel constrained to follow, constitutes an abuse of process of the Bankruptcy Court, and that the Supreme Court of the United States should consider, determine the question and change the law so as to do away with the presumption of continued possession.

The recent decisions of the Circuit Court of Appeals, in which they rely upon a presumption of continued possession, are in conflict with the decisions of the Circuit Court of Appeals of the Seventh Circuit. *In re J. L. Marks & Co.,* 85 F. (2d) the decision of the Circuit Court of Appeals for the Fifth Circuit, *Samel, et al.* v. *Dodd,* 142 Fed. 68, Circuit Court of Appeals for the Eighth Circuit, and *Marin* v. *Ellis,* 15 F. (2d) 321.

The Referee and the District Court erred in making an order which operates *in personam,* by requiring petitioner to do the thing commanded upon pain of punishment by imprisonment for refusal, without having required the Trustee to affirmatively prove, particularly in view of the lapse of three years and four months, that the petitioner had the money in his possession or under his control at the time of the order and the power to comply with its requirements.

The questions involved should be settled by this Court, so that there may be a unanimity of opinion throughout the courts of the United States.

The questions involved should be settled by this Court, because the Circuit Court has expressed an opinion that the application of a continued presumption constitutes an abuse of process of the Bankruptcy Court.

The question involved should be settled by this Court because judges of the Circuit Court have expressed the desirability of the determination of this question by the Supreme Court of the United States, and is in effect a request to the Supreme Court that they determine that question.

Specifications of Error to be Advanced

The District Court and the Referee erred

1. In holding that the provisions of Section 21-L of the Bankruptcy Act were applicable to the facts in the case at bar.

2. In holding that the missing records were required to enable the Trustee's accountant to establish the cost of the merchandise sold between January 1, 1939 and September 28, 1939.

3. In finding a theoretical shortage upon the computation by the Trustee's accountants, where the proof submitted by the Trustee in support of the accountant's computations was not clear and convincing as required by law.

4. In failing to accept the testimony offered on behalf of the petitioner to show that the computations of the Trustee's accountants were erroneous and contrary to the facts.

5. In failing to find that the burden was upon the Trustee to establish by actual proof how much money or property petitioner had in his possession on September 28, 1939.

6. In holding that the Trustee may rely upon a presumption of continued possession over a period of almost three

and a half years in the case of a theoretical withholding of property.

7. In holding that the Trustee was not required to prove how much of the money still remained in the possession of the petitioner as an issue separate and apart from the original turnover, where almost three and a half years elapsed between the making of the assignment for the benefit of creditors and the turnover order by the Referee on February 23, 1943.

Summary of Argument

POINT A

There is a conflict of authority within the Circuit Court of Appeals for the Second Circuit on the question of when a trustee may rely on a presumption of continued possession resulting in the suggestion by the Circuit Court of Appeals for the Second Circuit, in its recent decisions, that this question be reviewed and finally determined by the Supreme Court of the United States.

POINT B

There is a conflict of authority on the question of presumption of continued possession among several circuits on the question of law involved in the case at bar, and there should be a unanimity of opinion among the various circuits with regard to this question.

POINT C

The Trustee did not offer any proof to show that petitioner had, at the date of the turnover order, any property of the bankrupt, although the law requires that the Trustee establish all the elements of a turnover proceeding by clear and convincing proof.

Argument

POINT A

There is a conflict of authority within the Circuit Court of Appeals for the Second Circuit on the question of when a trustee may rely on a presumption of continued possession resulting in the suggestion by the Circuit Court of Appeals for the Second Circuit, in its recent decisions, that this question be reviewed and finally determined by the Supreme Court of the United States.

One of the determining issues in the case at bar is whether the Trustee should have been permitted to rely upon the presumption of continued possession for a period of approximately three years and four months under the circumstances of the case.

The Trustee did not rely upon an actual withholding of property, but only upon a theoretical withholding of property. The Trustee adopted a figure representing the opening inventory from a financial statement given by the bankrupt, although the petitioner offered proof during the course of the turnover proceeding to the effect that the inventory books by reason of errors and omissions overstated the extent of the inventory by approximately 113,000 yards. The Referee applied Section 21-L of the Bankruptcy Act in arriving at the amount unaccounted for by petitioner.

Section 21-L of the Bankruptcy Act provides that where the books or records from which the cost of sales are not made available to the Trustee in Bankruptcy, the Trustee may rely upon the presumption that the sales price is not less than the cost of the merchandise sold. Petitioner contends that there are in evidence books and records from which the cost price of the merchandise sold could have been

ascertained by the accountants for the Trustee in Bankruptcy. As a result of this presumption and acceptance of the opening inventory figure, the Referee arrived at the amount of $69,921.24 representing merchandise allegedly unaccounted for by the bankrupt, Union Fabrics, Inc.

Testimony was offered on behalf of the petitioner to the effect that he did not have any money or property of any kind, nature or description, did not have enough for living expenses, nor enough to retain an attorney or accountants to properly defend him in connection with the turnover proceedings, and in spite of that the Referee, in granting the turnover order, relied upon a presumption in law that the petitioner continued to have possession of the property for approximately three years and four months.

Circuit Judge Frank, who wrote a concurring opinion in the case at bar, stated as follows:

> "I concur but with the hope, expressed by Judge Learned Hand in Robbins v. Gottbetter, 2 Cir., 134 F. 2d 843, 844, and Seligson v. Goldsmith, 2 Cir., 128 F. 2d 977, 978, 979, that the Supreme Court will soon grant certiorari in some such case as this and overrule precedents that fasten upon us what seems to him and me an irrational rule of presumption, obviously contrary to fact, which enables trustees in bankruptcy to employ civil actions as substitutes for criminal proceedings."

In *Seligson* v. *Goldsmith,* 128 F. (2d) 977 (C. C. A., 2nd Cir.), an appeal was taken from an order of the District Court which confirmed a Referee's order directing the respondent to deliver to the Trustee merchandise, or in place, its value, in the sum of $1,812.50. There was absolute proof that the merchandise was in possession of the bankrupt not later than January, 1939. The adjudication in bankruptcy was on June 22, 1939, and the order of the Referee was entered on October 21, 1941. This is a period of two years and ten months. Circuit Judge Learned Hand, who wrote the unanimous opinion of the Court,

discussed the question of a continued presumption at great length, and stated in part as follows, at page 978, referring to continued presumption:

> "* * * we cannot conceive how anyone can believe that it is 'supported' by that 'clear and convincing evidence' which must exist to satisfy the test laid down in Oriel v. Russell, supra, 278 U. S. 258, 362, 49 Sup. Ct. 173, 174, 73-1 Ed. 419."

Circuit Judge Hand considered the presumption of continued possession as unsuitable, and at page 979 stated as follows:

> "However desirable that consummation may be, this fact makes the presumption unsuitable for its only proper purpose of eliciting the facts on whose existence the relief hangs; facts which in this situation the Courts know and every one else knows not to exist."

Circuit Judge Learned Hand states, in effect, that were it not for precedents of his court, he would not rely upon a presumption of continued possession such as was done in the case at bar, and at page 979 states as follows:

> "For these reasons, were the matter now before us as *res integra*, we should reverse the order. It would not disturb us that without the presumption such proceedings would generally fail, * * *."

Circuit Judge Hand, in analyzing the situation, finds that the Courts do not have to rely upon a presumption of continued possession because other relief is available, and at page 979 further states as follows:

> "Even if the absence of any other relief were ever an excuse for perverting the legal proceedings from their avowed purpose, or for basing relief upon facts which cannot be known, other relief is here in fact available, for those offenders are extremely vulnerable and can ordinarily be successfully prosecuted, as every judge of experience knows."

Circuit Judge Learned Hand, in his opinion, takes the view that even if other relief were not available, the continuance of the Courts to rely upon a presumption of possession in turnover proceedings, would be an abuse of its processes, which would discredit the Courts generally and impair its integrity, and further states at page 979 as follows:

> "And though that were not so, it would be at too high a cost that the law should proceed in the face of basic ignorance which it dares not aver and must cover by a transparent eviction; such an abuse of its processes discredits it generally and impairs its integrity, which in the end depends upon an unswerving allegiance to the truth so far as truth is accessible."

Under these circumstances, Circuit Judge Learned Hand expresses the considered opinion that the Supreme Court, which has never committed itself to the presumption, should finally determine the question, and at page 979 states as follows:

> "The Supreme Court has never committed itself to the presumption, and perhaps at some time may think it desirable finally to determine the question."

In the case at bar we even have a more serious situation in connection with lack of actual proof on the part of the Trustee, because the Referee relied on a presumption given to him by Section 21-L as to the cost price of the merchandise sold, and then relied on a presumption of continued possession. It is a well-known maxim in the law that a presumption should not be based upon a presumption, as was done in the case at bar, or one inference drawn from another.

Robbins v. *Gottbetter,* 134 F. (2d) 843, involved a turnover order in the sum of $2,500 found to have been withdrawn by the bankrupt during a period of three months before November, 1940. The Referee's order for the turnover was made in April, 1942, about eighteen months later.

Here, as in the case of *Seligson* v. *Goldsmith,* cited supra, the majority opinion of the Circuit Court expresses the view again that they were following the earlier decisions against their own better judgment, and at page 844 stated as follows:

> "The whole proceeding is, to the minds of us two, an abuse of the process of the Bankruptcy Court; but, until the Supreme Court, which has never really considered the matter, sees fit to change the law as it has been settled, we regard ourselves as concluded."

In earlier decisions, however, the Circuit Court of Appeals for the Second Circuit refused to accept the principle that the trustee is entitled to proceed to a turnover order on the theory of presumption of continued possession.

In re Danish v. *Sofranski,* the Circuit Court of Appeals for the Second Circuit, in an opinion written by Circuit Judge Learned Hand, handed down on December 13, 1937, and reported in 93 F. (2d) 424, stated as follows:

> "However, the trustee was obliged to prove not only that the respondents had wrongfully abstracted this money, but how much of it they had in their hands when the referee's order passed, at least his first order of March 2, 1937. In re Schlesinger (C. C. A. 2nd Cir.), 4 Am. B. R. 361, 102 F. 118; Sinsheimer v. Simonson (C. C. A. 6th Cir.), 5 Am. B. R. 537, 107 F. 898, 907; In re Holden (C. C. A. 6th Cir.), 29 Am. B. R. 387, 203 F. 229, 233; In re Redbord (C. C. A. 2nd Cir.), 5 Am. B. R. (N. S.) 357, 3 F. (2d) 793."

Circuit Judge Learned Hand discussed the extent of proof that the Trustee must offer to sustain a turnover order and made a clear distinction between the amount of proof necessary in connection with a turnover for chattels, where it is enough to show that they were secreted, and a turnover for money, or goods, which could be dissipated. With regard to money or goods which could be dissipated, Circuit Judge Learned Hand stated as follows:

> "But when the respondent acknowledges receiving the property, and it is of a kind that he would be likely to dissipate—money or saleable goods—there is no reason why the trustee should not prove how much remains within the respondent's control. In such cases the trustee must make out his case upon this issue just as he must upon the original taking. In re Schoenberg (C. C. A. 2nd Cir.), 25 Am. B. R. (N. S.) 262, 70 F. (2d) 321; In re J. L. Marks & Co. (C. C. A. 7th Cir.), 32 Am. B. R. (N. S.) 57, 85 F (2d) 392."

In re Schoenberg, 70 F. (2d) 321, cited by Judge Learned Hand, is a decision of the Circuit Court of Appeals for the Second Circuit, and in that case, at page 323, it is stated as follows:

> "But the turnover order cannot stand. A turnover order presupposes that the person against whom it is directed has possession of the property or money which he is directed to deliver up. In re Redbord, 3 F. (2d) 793, 794 (C. C. A. 2). In the case at bar the trustee made no attempt to show what part of the merchandise originally transferred was still on hand or that the appellant had the sum of money which in the alternative it was directed to pay over."

Later, in the *Matter of Pinsky-Lapin & Co.,* 98 F. (2d) 776, the Circuit Court of Appeals for the Second Circuit in a divided decision overruled the principle of law laid down in *Danish* v. *Sofranski,* cited supra.

Circuit Judge Learned Hand, in a dissenting opinion, in *In Re Pinsky-Lapin,* at page 781, stated:

> "I cannot see how our decision in Danish v. Sofranski, 2 Cir., 93 F. (2d) 424, is material here; any comment upon it is inevitably obiter. But since my brothers think it desirable to overrule it, I wish to dissent pro tanto. That case was very deliberately considered, and the doctrine was not laid down by chance; in our judgment we were only following In re Schoenberg, 2 Cir., 70 F. (2d) 321, the doctrine of which we believed, as I still believe, was right."

The view taken by Circuit Judge Learned Hand and recently concurred in by Circuit Judge Jerome N. Frank, in the case at bar, and by Circuit Judge Swan in the case of *Seligson* v. *Goldsmith,* supra, appears to be supported by the principle of law laid down in the case of *Oriel* v. *Russell,* 278 U. S. 358, where the Supreme Court of the United States held that a proceeding for a turnover order requires clear and convincing evidence of the justice of such order before it is made.

There is, undoubtedly, a disagreement among the judges of the United States Circuit Court of Appeals for the Second Circuit on the question of the continuation of the use of the principle of presumption of continued possession as applied to turnover proceedings.

It is the considered opinion of Circuit Judge Learned Hand and some of his colleagues that the Supreme Court should consider this question and determine it finally, and upon such determination should establish a principle of law that the trustee prove the extent of the property which remains in the hands of the respondent in such turnover proceedings at the time that the turnover order is made instead of relying upon a presumption of continued possession.

POINT B

There is a conflict of authority on the question of presumption of continued possession among several circuits on the question of law involved in the case at bar, and there should be a unanimity of opinion among the various circuits with regard to this question.

Where there is a conflict of authority among the several circuits on a question of law which involves the liberty of the individual, especially in a case where a man can be coerced by indefinite imprisonment to do what it is uncertain that he can do at all, such question should be finally and definitely settled by the Supreme Court of the United States.

It must be recognized that in all human affairs some doubts must enter, but when the stake is liberty, we should make sure that we are applying principles of law which have been upheld by the Supreme Court of the United States and not those around which grave doubts exist, as in the case at bar.

The Circuit Court of Appeals for the Second Circuit has, in a number of decisions, relied upon the presumption of continued possession. *In re Pinsky-Lapin & Co.*, cited supra, *In re H. Magen Co.*, 10 F. (2d) 91, *Steinreich Associates, Inc.*, 83 F. (2d) 254.

The Eighth Circuit holds a contrary view to that of the Second Circuit. In *Marrin* v. *Ellis* (C. C. A. 8), 15 F. (2d) 321, the bankrupt was adjudged as such on December 22, 1922. The turnover order was made by the Referee on April 27, 1925. A period of 28 months elapsed. The Circuit Court, in affirming the orders of the courts below, stated at page 321:

> "The legal presumption is that a bankrupt, who at the time of his adjudication in bankruptcy has and unlawfully holds back from his trustee in bankruptcy a part of his property, or of its proceeds, continues to hold it or them, *but this presumption grows weaker as time passes, until it finally ceases to exist.*" (Italics writer's.)

It appears from the foregoing that where 27 months were involved between the date of the bankruptcy and the date of the turnover order, the Circuit Court for the Eighth Circuit refused to grant a turnover on the theory of a presumption of continued possession.

In *In re J. L. Marks*, 85 F. (2d) 392 (Circuit Court of Appeals 7th Circuit), the Circuit Court, in a similar case, in reversing an order of the court below, at page 393, stated as follows:

> "We assume for the purpose of the argument that the appellant Marks individually received the $6,500.00.

We are not, however, satisfied that the evidence is sufficient to support a finding that he possessed the money either at the time the bankruptcy proceedings were instituted or when the order to turn over the money was entered. We therefore conclude that the order was erroneously entered. Oriel v. Russell, 278 U. S. 358, 49 S. Ct. 173, 73 L. Ed. 419."

In *In re Samel* v. *Dodd* (C. C. A. 5), 142 Fed. 68, the Circuit Court, at page 73, stated:

"The bankrupts, in their answers, have sworn that they have not in their possession or under their control the money or goods involved in this proceeding. It seems to me that any evidence that conclusively showed they presently had in possession and control either the money or the goods would necessarily show where the same was kept or deposited, so that it could be reached by the process of the bankruptcy court, or of some court in a suit by the trustee. But, however that may be, the record in this cause, taken as a whole, fails to show that the bankrupts had in their possession at the date of the order committing them for contempt either the money or the goods referred to. If the bankrupts have sworn falsely in their pleadings or on their examination—and this proceeding is based solely on that hypothesis—the law provides for their punishment on indictment and conviction by a procedure which secures to them the right of trial by jury with all its constitutional safeguards."

This latter case entirely follows the reasoning of the Circuit Judge of the Second Circuit, as expressed in the concurring opinion of Circuit Judge Frank in the case at bar, and in the opinion of Circuit Judge Learned Hand in the case of *Seligson* v. *Goldsmith*, supra, and the case of *Robbins* v. *Gottbetter*, supra.

Aside from the conflict of authority and the suggestion made by the judges of the Circuit Court of Appeals for the Second Circuit that the question should be determined, there is still an additional and more important reason why this question should be determined. To imprison one for not doing what he cannot do, is inconsistent with the prin-

ciples of individual liberty. There is no statute or law which confers such authority. Imprisonment, under such circumstances, for failure to pay money, where it has not been proved by clear and convincing evidence that that person has money, is unwarranted by law in a jurisdiction where imprisonment for debt is forbidden.

Where the person has the power to comply with the order, having the money or thing in question in his possession, he may, of course, be punished for his failure to surrender it without a conflict of any rule of law against imprisonment for debt, but such imprisonment should not be based upon a presumption, but must be established upon facts.

POINT C

The Trustee did not offer any proof to show that petitioner had, at the date of the turnover order, any property of the bankrupt, although the law requires that the Trustee establish all the elements of a turnover proceeding by clear and convincing proof.

The Referee in the case at bar reached his conclusion by the presumption allowed by law under Section 21-L, and also by a presumption of continued possession of the property found to have been unaccounted for as of September 28, 1939.

All courts have recognized that motions for turnover orders are serious proceedings. They are serious for the Trustee because he is entitled to property which belongs to the estate. They are much more serious to the respondent because if there is a failure of that clear evidence referred to by Chief Justice Taft in *Oriel* v. *Russell*, 278 U. S. 358, 49 S. Ct. 173, pointing to them as possessors of the property in question, they may be involved in the predicament of having to go to jail for not doing something that they cannot possibly do.

In *Boyd* v. *Glucklich,* 116 F. 131, 140, the Court stated:

> "The referee's conclusion seems to have been reached mainly, if not altogether, by approximate estimates, inferences, and conjectures, which, while they give rise to very strong suspicion, fall short of direct and conclusive proofs. The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass."

The Trustee should not be relieved of the burden placed upon him to prove by affirmative evidence that petitioner had failed to account for the merchandise or its proceeds alleged to be in the sum of $69,921.24, and how much remained at the date of the making of the turnover order.

In *Epstein* v. *Steinfeld* (C. C. A. 3), 210 Fed. 236, 239 (cited with approval in *Oriel* v. *Russell,* 278 U. S. 358, 49 Sup. Ct. 173, 73 L. Ed. 419), the Court said:

> "The second stage is to determine whether or not the property required is still in the possession or control of the bankrupt and that he is physically able to deliver it to his trustee."

In the case at bar no testimony was offered by the Trustee in compliance with what is termed "the second stage" of a turnover proceeding. The Trustee merely relied upon the presumption of continued possession.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that an important question of Federal law may be settled, as hereinabove discussed, and that to such end a writ of certiorari be granted and this Court review the decision of the Courts below and finally reverse it.

ARCHIBALD PALMER,
Counsel for Petitioner.

MOTION TO DISPENSE WITH PRINTING AND SERVICE OF THE RECORD

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

ABRAHAM JESKOWITZ,
Petitioner,

against

LEONARD H. CARTER, as Trustee in Bankruptcy of UNION FABRICS, INC.

Counsel for petitioner in this case files herewith his petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, accompanied by a copy of the original papers constituting the record of the proceedings in the case in the District Court, and before the Referee, together with the record of the proceedings in the Circuit Court of Appeals, duly certified by the Clerk of the Circuit Court of Appeals.

1. The nature of this case and the questions presented by the petition for a writ of certiorari has been set forth in the foregoing petition for the writ of certiorari.

2. Petitioner seeks to be relieved of the printing of the record of the proceedings before the Referee, the District Court, and to have this application for a writ considered, and for leave to proceed upon the typewritten record.

The record consists of approximately 600 pages. Petitioner has received an estimate that it would cost at least $750 to print the record of the proceedings. Petitioner, before the Circuit Court of Appeals on his application,

was allowed to proceed with the appeal upon a typewritten record, for the reason that he did not have sufficient funds to pay for the printing of the record, and did not have funds during a great portion of the proceedings to retain counsel to represent him, and found himself in a position to conduct his own defense to the turnover proceedings. Petitioner does not now have $750 with which to pay for the printing of the record, and has no means of obtaining such fund. Petitioner will have difficulty in raising the moneys in order to print the application for the writ of certiorari, the briefs on appeal if same are allowed, and the necessary clerk's deposit for the consideration of the application for a writ.

In these circumstances, it is impossible because of the expense involved, to comply with the requirements of this Court with respect to the filing of a certified printed copy record of the proceedings in the case, and in lieu thereof petitioner has filed the certified typewritten copy of the proceedings before the Referee, the District Court and the Circuit Court of Appeals.

WHEREFORE, it is prayed

(a) That the Court rule that the accompanying petition for a writ of certiorari is properly filed upon the record consisting of a copy of the original papers before the Referee, the District Court and a certified copy of the record of proceedings in the Circuit Court of Appeals now on file in this Court.

(b) That it rule that the service which petitioner is now making upon the respondent of copies of this motion, the petition for writ of certiorari herein constitutes sufficient compliance with the rules of this Court.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Abraham Jeskowitz,
Petitioner.

November, 1944.

No. 658

Office - Supreme Court, U. S.
DEC 1 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1944

ABRAHAM JESKOWITZ,

Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of Union Fabrics, Inc.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH GLASS,
ALBERT PARKER,
Attorneys for Trustee-Respondent.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 188

INDEX

PAGE

PRIOR PROCEEDINGS HEREIN 1

STATEMENT OF THE CASE 2

PETITIONER'S SPECIFICATIONS OF ERROR..... 5

ARGUMENT:

POINT I—The presumption of continued possession finds approval in decisions of this Court..... 7

POINT II—There is no conflict of authority within the Circuit Court of Appeals for the Second Circuit on the propriety of the use of the presumption of continued possession in turnover proceedings. 12

POINT III—There is no conflict of authority on the question of the presumption of continued possession in the various Circuit Courts of Appeals..... 13

CONCLUSION 15

Table of Cases

PAGE

Boehmer v. Pennsylvania Railroad Company, 252 U. S. 496 6
Cooper v. Dasher, 290 U. S. 106 . . . . . 9, 11
Danish v. Sofranski, 93 F. 2d 424 . . . . . 12, 13
Kellogg & Sons v. Hicks, 285 U. S. 502 6
In re J. L. Marks, 85 F. 2d (C. C. A. 7th) 392 14
Marrin v. Ellis, 15 F. 2d (C. C. A. 8th) 321 14
In re Meier, 182 F. (C. C. A. 8th) 799 14
Oriel v. Russell, 278 U. S. 358 . . . . . 10, 11
Pinsky-Lapin & Co., 98 F. 2d 776 12
Reiss v. Reardon, 18 F. 2d (C. C. A. 8th) 200 14
Robbins v. Gottbetter, 134 F. 2d (C. C. A. 2nd) 843 . . . 10
In re Samel v. Dodd, 142 F. (C. C. A. 5th) 68 14
Seligson v. Goldsmith, 128 F. 2d 977 12
Sonzinsky v. United States, 300 U. S. 506 5
United States v. Johnston, 268 U. S. 220, 227 6
Waterloo Distilling Corporation v. United States, 282 U. S. 557 5

Miscellaneous

General Order 47 in Bankruptcy 6
Section 21-L of the Bankruptcy Act 3N, 4, 5, 14

In the

Supreme Court of the United States

October Term—1944

Abraham Jeskowitz,

Petitioner,

against

Leonard H. Carter, Trustee in Bankruptcy of Union Fabrics, Inc.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Prior Proceedings Herein

On February 23, 1943, Referee Peter B. Olney made an order directing petitioner, president of the bankrupt, Union Fabrics, Inc., to turn over to the trustee the following property of the bankrupt (R* 23a, 24a):

* Numbers in parentheses preceded by "R" refer to pages in record. Numbers in parentheses preceded by "SM" refer to pages in the stenographer's minutes.

1. Certain merchandise consisting of silk, rayon and other textiles of the cost value of $69,921.24, or the proceeds thereof; and

2. $875, the proceeds of a diamond ring pledged as collateral with the bankrupt and converted by appellant; and

3. The books and records of the bankrupt consisting of all its merchandise inventory sheets for the years 1937, 1938 and 1939, its journal for the year 1938, and its general ledger and purchase invoices for the year 1937.

On May 6, 1943, the order of the Referee was confirmed, upon petitioner's petition to review, by the United States District Court, for the Southern District of New York (R 5a-6a).

On July 21, 1944, the Circuit Court of Appeals, Second Circuit, unanimously affirmed the order of the District Court (R 85a-86a).

Opinions were written by the Referee (R 25a-30a), the District Court (R 7a-11a) and the Circuit Court (R 79a-84a). The opinion of the Circuit Court is reported at 144 F. 2d 39.

Statement of the Case

Respondent controverts the statement of facts contained in the petition. Respondent respectfully refers the Court to the opinion of the Circuit Court for a full and fair statement of the facts.

For present purposes, it will be sufficient to set forth a tabular summary which was contained in the Referee's opinion, which summary was quoted in the opinion of the Circuit Court of Appeals. It is as follows (R 26a):

"Bankrupt had merchandise on hand on January 1st, 1939 of the value of	$194,785.05	
(Financial Statement, Trustee's Exhibit 1, 10/24/41)		
Merchandise was purchased during period from January 1st, 1939 to September 28th, 1939, net....	218,351.91	
Total merchandise to be accounted for.....		$413,136.96
Less: Cost of merchandise sold during period January 1st, 1939 to September 28th, 1939, assuming sales at not less than cost for though respondent, Jeskowitz, had testified at an adjourned first meeting that the sales price represented a markup of 10% gross (Trustee's exhibit 12, adjourned 1st mtg. October 24th, 1941, pp. 36-38) the respondent I find to be wholly unworthy of belief and therefore no testimony by him can be given any credence, on the other hand the witness, Gelbart, who gave testimony of sales below cost was proved to be totally unreliable and utterly unworthy of belief (See Bankruptcy Act Section 21-L*)	322,587.36	
Merchandise on hand September 28th, 1939 (S. M. 322-4).....	20,628.36	343,215.72
Shortage as of September 28th, 1939.....		$ 69,921.24"

* Section 21-L of the Bankruptcy Act provides as follows:

"In any proceeding under this Act against a bankrupt for an accounting by him for his property or the disposition thereof, or to compel a turn-over of property by him, if his books, records, and accounts shall fail to disclose the cost to him of such property sold by him during any period under consideration, it shall be presumed, until the contrary shall appear, that such property was sold at a price not less than the cost thereof to him."

The correctness of none of the above figures was ever disputed in the prior proceedings herein until the filing of the present petition for a writ of certiorari. Petitioner complains at pages 4, 5 and 7 of his petition that the Referee accepted the starting inventory figure of $194,785.05, which was contained in a financial statement signed by appellant (SM 321), "even though evidence was offered to show that there were many errors and omissions totalling approximately 113,000 yards of merchandise in the inventory record." There was not as much as a suggestion in the evidence offered on behalf of the petitioner that this starting inventory figure was otherwise than accurate or was based upon any erroneous inventory records. Quite to the contrary, the testimony of the petitioner clearly showed that the inventory figure in question contained in the financial statement was based upon a physical inventory (SM 29-30, 42-43, 49, 91, 100, 108, 129, 199 and 448).

The petitioner now complains that the Referee erred in applying the presumption provided for in Section 21L of the Bankruptcy Act. No such complaint was ever addressed to the Referee, to the District Court or to the Circuit Court of Appeals. The propriety of the application of the presumption was acquiesced in before the Referee by the petitioner who proceeded to attempt to sustain the burden cast upon him by Section 21L of the Bankruptcy Act of proving that the merchandise was sold below cost. The basis of petitioner's present complaint that the Referee erred in applying the presumption of Section 21L of the Bankruptcy Act is that it is claimed that the books and records in evidence before the Referee were sufficient for the purpose of showing the cost price of the merchandise sold between January 1, 1939 and September 28, 1939 (pp. 5, 6, 11 and 12 of the Petition). The trustee took the position that he was unable to prove the cost of the merchandise sold because of the absence of certain necessary books and records of the bankrupt. The Referee found, and the finding has

been confirmed by the District Court and the Circuit Court of Appeals, that the petitioner had in his possession the following books and records belonging to the bankrupt: Journal for the year 1938, General Ledger for the year 1937, all inventory sheets for the years 1937, 1938 and 1939, and purchase invoices for the year 1937 (R 23a-24a). The petitioner does not now question the correctness of so much of the order as directs him to turn over to the trustee the aforementioned books and records. By what manner or means the trustee could have ascertained the cost of the merchandise sold between January 1, 1939 and September 28, 1939 without the aid of these books and records is not set forth in the petition. It is difficult to fathom how the trustee could have done so, especially in view of the fact that the petitioner, who was president and sole active officer and stockholder of the bankrupt, was himself unable to do so.

Petitioner does not challenge the correctness of so much of the turnover order as relates to the missing books and records and the proceeds of the diamond ring (p. 2, *supra*). It is therefore unnecessary to state the facts upon which so much of the turnover order as relates to those items was based, or to discuss the law with respect thereto.

Petitioner's Specifications of Error

Petitioner's specifications of error Nos. 1 and 2 relate to the applicability of Section 21L of the Bankruptcy Act. As above pointed out, this question was not urged by petitioner before the Referee, the District Court or the Circuit Court of Appeals. This Court has uniformly refused to consider questions not previously raised in the case.

> *Sonzinsky* v. *United States*, 300 U. S. 506;
> *Waterloo Distilling Corporation* v. *United States*, 282 U. S. 577.

Petitioner's specification of error No. 3 is to the effect that the proof of the shortage was not established by

"clear and convincing" evidence. As has previously been pointed out, the shortage was established solely on the basis of the books and records of the bankrupt and its financial statement signed by petitioner. The correctness of none of the books, records or the financial statement upon which the finding of the shortage was based was challenged at the hearings.

Petitioner's specification of error No. 4 relates to the refusal of the courts below to accept the testimony offered on behalf of the petitioner. The Referee saw and heard the petitioner and his witnesses and came to the conclusion that "each of them is wholly unworthy of belief" (R 28a). The District Court, in its opinion, agreed with the Referee's conclusion that the petitioner and his witnesses were unworthy of belief (R 10a). The Circuit Court of Appeals, after a review of the evidence, held:

> "The Referee was entirely justified in disbelieving Gelbart (petitioner's principal witness) and Jeskowitz (petitioner)."

The Referee's determination on the question of the credibility of the petitioner and his witnesses, that determination having been concurred in by the District Court and the Circuit Court of Appeals, presents no question for review by this Court.

United States v. *Johnston,* 268 U. S. 220, 227;
Kellogg & Sons v. *Hicks,* 285 U. S. 502;
Boehmer v. *Pennsylvania Railroad Company,* 252 U. S. 496;
General Order in Bankruptcy 47.

The alleged errors in specifications of error Nos. 5, 6 and 7 relate to the use by the Referee of circumstantial evidence to sustain his findings that the petitioner was in possession of the bankrupt's missing property at the time of the assignment for the benefit of creditors, as well as at the date of the turnover order. These alleged errors will be discussed in the argument which follows.

Argument

I. The presumption of continued possession finds approval in decisions of this Court.

II. There is no conflict of authority within the Circuit Court of Appeals for the Second Circuit on the propriety of the use of the presumption of continued possession in turnover proceedings.

III. There is no conflict of authority on the question of the presumption of continued possession in the various Circuit Courts of Appeals.

POINT I

The presumption of continued possession finds approval in decisions of this Court.

It is rarely possible for a trustee to prove that a respondent in a turnover proceeding has actual physical possession of property belonging to a bankrupt at the time of the hearing. The trustee must necessarily attempt to prove the respondent's possession at the time of the hearing by evidence that on some previous occasion the respondent had the missing property. The trustee must then rely upon the reasonable presumption that the respondent still has possession of the property which he was shown to have had on the previous occasion.

Resort to the presumption works no undue hardship on the respondent. If, although he was in possession of the property on the previous date, the property is no longer within his possession or control, evidence to that effect is fully available to him. If he has placed it beyond his power

to deliver up the property which the proof shows that he possessed on the previous date, it is for him to show that he has done so and not for the trustee to show that he has not. This logic cannot be altered by the circumstance that in some cases the respondent's wrongdoing with respect to the bankrupt's property might have made it embarrassing for him to tell the truth. It is unfortunate for the respondent if he has so enmeshed himself in his own machinations that telling the truth would be "jumping from the frying pan into the fire." If in this unfortunate dilemma the respondent is deserving of a display of tenderness, certainly that tenderness should not go to the extent of robbing the trustee of the force of the presumption that the respondent still has the property of the bankrupt which the trustee showed that he had as of some earlier date.

The gist of petitioner's contention is that no turnover order should ever be made unless it is supported by direct evidence of possession of the missing property at the time the order is made. Petitioner does not content himself with the contention that the evidence should have shown his possession of the property at the time of the filing of the petition for the turnover order or at the time of the hearings. This appears from petitioner's continual reference to the fact that over three years elapsed between the time of assignment for the benefit of creditors and the Referee's turnover order. The proceedings for the turnover order were actually commenced within ten months after the petition in bankruptcy was filed (R 20a). The record will show that the lapse of two and a half years between the commencement of the turnover proceedings and the entry of the turnover order is attributable to the petitioner's applications for adjournments and to his vain and protracted efforts to concoct explanations for the shortage.

The present case furnishes a good illustration of the absurdity of petitioner's contention that there must be

proof of possession of the missing property at the moment of the making of the turnover order *dehors* the presumption. If the contention that the trustee cannot rely upon the presumption of possession were to prevail, it would have been incumbent upon the trustee not only to establish at every adjourned hearing of the turnover proceedings that the petitioner was presently in possession of the missing property, but also to have established that fact anew after the hearings had been closed at the moment preceding the making of the turnover order.

This Court has shown its approval of the use of the presumption of continued possession in turnover proceedings. In *Cooper* v. *Dasher,* 290 U. S. 106, the United States Supreme Court reversed an order of the Circuit Court of Appeals which had reversed an order of the District Court requiring the respondent to turn over property to the trustee in bankruptcy. As appears from the opinion of this Court, the proof of the shortage in that case was established by the records of the bankrupt. Some of the property was traced to the respondent. The trustee obtained a turnover order for the balance of the shortage. It is evident from the opinion of the Court that the turnover order was based upon the application of the presumption of continued possession. The Court held (p. 108):

> "The respondent has made away with goods belonging to the estate and defiantly withholds them. So the referee has found upon evidence not in the return and hence presumably sufficient. The process of computation and inference outlined in his report and leading up to his conclusion has support in many cases. See, e. g., Re H. Magen Co. (C. C. A. 2d) 10 F. (2d) 91, 93, 94, 7 Am. Bankr. Rep. (N. S.) 283; Re Chavkin (C. C. A. 2d) 249 Fed. 342, 41 Am. Bankr. Rep. 36; Re Stavrahn (C. C. A. 2d) 174 Fed. 330, 23 Am. Bankr. Rep. 168, 20 Ann. Cas. 888; Re Levy (C. C. A. 2d) 142 Fed. 442, 15 Am. Bankr. Rep. 166;

Sheinman v. Chalmers (C. C. A. 3d) 33 F. (2d) 902, 14 Am. Bankr. Rep. (N. S.) 374; Re Cohan (C. C. A. 3d) 41 F. (2d) 632, 16 Am. Bankr. Rep. (N. S.) 388."

All the cases cited in the foregoing excerpt authorize the use of the presumption of continued possession as a basis for a turnover order and a commitment order for contempt for failure to comply therewith.

In the leading case of *Oriel* v. *Russell,* 278 U. S. 358, this Court held that on an application to punish a respondent for having failed to comply with a turnover order, the turnover order is not subject to collateral attack. The Court accordingly further held that the respondent could not be permitted to show that he did not have the property at the time the turnover order was made but he would be permitted to show only that there had been some change in circumstances between the time of the turnover order and the application to commit him for contempt, which made it impossible for him to comply with the order. The effect of this holding is to apply to contempt proceedings based upon failure to comply with turnover orders the presumption of continued possession. If it may be validly presumed that a respondent in a proceeding to commit him for contempt, which directly involves his liberty, is in present possession of property which he was shown to have had at the date of the turnover order, there is no cogent reason why it may not be presumed in a turnover proceeding that the respondent is in present possession of property which he is shown to have had at the time of bankruptcy.

In his concurring opinion in *Robbins* v. *Gottbetter,* 134 F. 2d (C. C. A. 2nd) 843, Circuit Judge Augustus N. Hand pointed out, in answer to the criticism in the majority opinion of the use of the presumption of continued possession in turnover proceedings, that the use of such presumption is implicit in the decisions of this Court. He stated as follows (p. 844):

"I concur in the result reached by the majority. I see no ground, however, for protesting against a rule which I believe is implicit in the decisions of the Supreme Court in Oriel v. Russell (Prela v. Hubshman), 278 U. S. 358, 49 S. Ct. 173, 175, 73 L. Ed. 419. Though the appeal in Prela v. Hubshman was from a commitment order, the same question arose which confronts us here, namely, whether the bankrupt still remained in possession of the assets he was shown to have withheld from his trustee. The turnover order in Prela v. Hubshman was made about twenty months after the date of the petition in bankruptcy and the commitment order about fourteen months after the date of the turnover order. Nevertheless, all the justices of a court of which those exceptionally alert guardians of civil rights, Justices Holmes, Brandeis and Stone, were members, unanimously concurred in the opinion of Chief Justice Taft, which quoted with approval the remarks of Judge McPherson of the Third Circuit in Re Epstein, 206 F. 568, 569, and concluded by saying:

'In the two cases before us, the contemnors had ample opportunity in the original hearing to be heard as to the fact of concealment, and in the motion for the contempt to show their inability to comply with the turnover order. They did not succeed in meeting the burden which was necessarily theirs in each case, * * *.'"

It clearly appears from the decisions of this Court in *Cooper* v. *Dasher, supra* and *Oriel* v. *Russell, supra,* that the presumption of continued possession in turnover proceedings has the approval of this Court.

POINT II

There is no conflict of authority within the Circuit Court of Appeals for the Second Circuit on the propriety of the use of the presumption of continued possession in turnover proceedings.

There is not any dispute in the Circuit Court of Appeals for the Second Circuit that the requirement that the trustee must prove the ability of the respondent to comply with the turnover order can be satisfied by proof that the respondent had possession of the property at the time of bankruptcy, coupled with the presumption of continued possession.

In *Danish* v. *Sofranski,* 93 F. 2d 424, the Circuit Court of Appeals for the Second Circuit introduced an exception to that rule by holding that where the respondent acknowledges the original taking, it is then incumbent upon the trustee to prove, without the aid of the presumption of continued possession, how much of the property remains in the hands of the respondent at the time the turnover order is sought.

In *Pinsky-Lapin & Co.,* 98 F. 2d 776, *Danish* v. *Sofranski, supra,* to the extent that it introduced the exception above indicated, was overruled. In the later case of *Seligson* v. *Goldsmith,* 128 F. 2d 977, Judge Learned Hand stated (p. 978):

> "In Danish v. Sofranski, 2 Cir. 93 F. 2d 424, we tried to prick a path—not it is true guided by seamless logic, as we observed at the time—in the hope of finding something which would harmonize the decisions; but by a divided court we later overruled this attempt in Re Pinsky-Lapin & Co., 2 Cir., 98 F. 2d 776, and it was better that we did."

It is clear from the foregoing that there is no conflict in the decisions of the Circuit Court of Appeals for the

Second Circuit, regarding the use of the presumption of continued possession in turnover proceedings. *Danish* v. *Sofranski, supra,* which marked a departure from previous decisions, has been expressly overruled.

Moreover, the correctness of the principle laid down in *Danish* v. *Sofranski, supra,* is in no way involved in the present case. The factor which prompted the Circuit Court to attempt to lay down a special rule, namely, acknowledgment of the original taking, is lacking in the present case. In the present case, the petitioner has at all times denied the original taking. Whatever logic might have justified the rule in *Danish* v. *Sofranski, supra,* which refused to apply the presumption where the original taking is admitted, does not apply where the original taking is denied.

Petitioner, in protesting the use of the presumption of continued possession, is attempting to blow hot and cold at the same time. His contention that the lapse of time destroys or weakens the force of the presumption implies that he has disposed of the property or has placed it beyond his control since the filing of the petition for the turnover order while in his answer and at the hearings he emphatically and unequivocally denied that the property had ever come into his possession.

POINT III

There is no conflict of authority on the question of the presumption of continued possession in the various Circuit Courts of Appeals.

Petitioner contends that there is a conflict of authority among the Circuit Courts of Appeals on the question of the presumption of continued possession, and that the Circuit Courts of the Fifth, Seventh and Eighth Circuits entertain a view on the question contrary to that of the Second Circuit. Petitioner cites and relies upon one case

in each of the Fifth, Seventh and Eighth Circuits to support his claim.

Marrin v. *Ellis,* 15 F. 2d (C. C. A. 8th) 321, relied upon by the petitioner, does not support his claim that there is a conflict between the Eighth Circuit and the Second Circuit. The rule of the presumption of continued possession has been followed by the Eighth Circuit in decisions both prior and subsequent to *Marrin* v. *Ellis, supra.*

See:

In re Meier 182 F. (C. C. A. 8th) 799;
Reiss v. *Reardon,* 18 F. 2d (C. C. A. 8th) 200.

In re J. L. Marks, 85 F. 2d (C. C. A. 7th) 392, relied upon by petitioner, does not discuss the question of the presumption of continued possession.

In re Samel v. *Dodd,* 142 F. (C. C. A. 5th) 68, does not support petitioner's claim. The excerpt quoted at page 19 of petitioner's brief is taken from the opinion of Judge SHELBY, which was not concurred in by a majority of the Court. The case did not in any way involve the presumption of continued possession. The Court there merely held that a respondent could not be required to turn over to the trustee the value of the bankrupt's property in his possession, but only the property itself.

All the decisions relied upon by petitioner in support of his contention that there is a conflict of authority in the Circuit Courts of Appeals antedate the enactment of Section 21L of the Bankruptcy Act. Section 21L, creating, for the purposes of a turnover proceeding, the presumption that the bankrupt's property was sold at not less than cost, was enacted in 1938.

The enactment of this Section was a clear legislative recognition of the presumption of continued possession, for

it was enacted for the purpose of assisting the trustee to establish a shortage upon the basis of the bankrupt's books and records. (See Report of the House Committee on the Judiciary, July 29, 1937, p. 26.) The statute would be rendered nugatory if a showing of actual physical possession at the time of the turnover order was necessary. There is never any necessity of resort to the presumption of 21L when actual physical possession at the time of the turnover order can be shown. Petitioner's argument would therefore lead to the *reductio ad absurdum* that a trustee may have the benefit of the presumption of 21L when and only when it is superfluous to his proof.

CONCLUSION

The petition for a writ of certiorari should in all respects be denied.

New York, N. Y., Nov. 28, 1944.

Respectfully submitted,

JOSEPH GLASS,
ALBERT PARKER,
Attorneys for Trustee-Respondent.

GLASS & LYNCH,
by SAMUEL BADER,

PARKER, CHAPIN & FLATTAU,
by SYDNEY W. CABLE,
Of Counsel.

Office - Supreme Court, U. S.
FILED
DEC 26 1944
CHARLES ELMORE CROPLEY
CLERK

No. 658

Supreme Court of the United States

OCTOBER TERM 1944

ABRAHAM JESKOWITZ,

Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of Union Fabrics, Inc.,

Respondent.

PETITION FOR REHEARING

ARCHIBALD PALMER,
Attorney for Petitioner,
320 Broadway,
Borough of Manhattan,
New York 7, N. Y.

CASES CITED

	PAGE
Boyd v. Glucklich, 116 Fed. 131	6
Danish v. Sofranski, In re, 93 Fed. (2d) 424	4
Epstein v. Steinfeld, 210 Fed. 236	6
H. Magen Co., In re, 10 Fed. (2d) 91	5
Marin v. Ellis, 15 Fed. (2d) 321	5
J. L. Marks, In re, 85 Fed. (2d) 392	6
Oriel v. Russell, 278 U. S. 358, 49 S. Ct. 173	6
Pinsky-Lapin & Co., In re Matter of, 98 Fed. (2d) 76	5
Robbins v. Gottbetter, 134 Fed. (2d) 843	4
Samel v. Dodd, In re, 142 Fed. 68	6
Seligson v. Goldsmith, 128 Fed. (2d) 977	4
Schoenberg, In re, 70 Fed. (2d) 321	5
Steinreich Associates, Inc., In re, 93 Fed. (2d) 254	5

Supreme Court of the United States

OCTOBER TERM 1944

ABRAHAM JESKOWITZ,

Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of Union Fabrics, Inc.,

Respondent.

PETITION FOR REHEARING

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of ABRAHAM JESKOWITZ respectfully shows:

FIRST: That heretofore your petitioner filed a petition for a writ of certiorari to review the order and decree of the Circuit Court of Appeals for the Second Circuit entered on August 2, 1944, affirming an order of the United States District Court for the Southern District of New York dated May 6, 1943. The order of the District Court affirmed the order of the Referee in Bankruptcy dated February 23, 1943. *This petition for writ was denied by this Court on December 11, 1944.*

SECOND: A turnover proceeding was instituted by the Trustee in Bankruptcy on or about October 25, 1940, charg-

ing petitioner, as president and sole stockholder of Union Fabrics, Inc., with having failed to account for merchandise valued at $69,921.24, the proceeds of a certain ring amounting to $824, and the following books and papers alleged to have been under his control: journal for year 1938, general ledger for year 1937, inventory sheets for the years 1937, 1938 and 1939, and all purchase invoices for the year 1937.

THIRD: On October 21, 1941, an amended petition was filed directing your petitioner to show cause why he should not turn over to the Trustee 187,363⅛ yards of silks and other textiles upon the theory that the Union Fabrics, Inc., the bankrupt, had on hand on January 1, 1939, merchandise of the cost or value of $194,785.05 and upon the further theory that the merchandise was sold at a price not less than cost during the period between January 1 and September 28, 1939. The Trustee contended, during the course of the hearing, that the missing records were necessary to establish the cost of the merchandise sold during the said period and therefore relied upon the provisions of Section 21-L of the Bankruptcy Act, which under such circumstances entitled the Trustee to treat the said merchandise as having been sold at a price not less than cost. The contention of the Trustee was accepted by the Referee and the mathematical computation made by the Trustee's accountant based upon such theory was accepted by the Referee.

FOURTH: The foregoing placed upon petitioner the burden to establish the exact cost of the merchandise sold during the period between January 1, 1939 and September 28, 1939, which petitioner was unable to do because of his financial inability to retain an accountant to make an examination of the books and records to ascertain the cost. Not only that but your petitioner did not know at that time that the books and records of the Union Fabrics, Inc., which were

turned over to the Trustee in Bankruptcy, were sufficient to establish exactly the cost of the merchandise sold during the period.

FIFTH: No proof was adduced before the Referee that your petitioner was actually in possession of this merchandise or the proceeds thereof but the turnover order was based upon this mathematical computation and his finding that theoretically your petitioner was in possession of this property as of the date of the assignment for the benefit of creditors which preceded the filing of the petition in bankruptcy in 1939.

SIXTH: The Referee, in making the turnover order on February 23, 1943, also relied on the presumption that if theoretically your petitioner was in possession of this property or its proceeds on September 28, 1939, then he continued in possession of the property until February 23, 1943, when the turnover order was made.

SEVENTH: When this matter came on before the Circuit Court of Appeals, Circuit Judge Frank, who wrote a concurring opinion, stated as follows:

> "I concur but with the hope, expressed by Judge Learned Hand in Robbins v. Gottbetter, 2 Cir., 134 F. 2d 843, 844, and Seligson v. Goldsmith, 2 Cir., 128 F. 2d 977, 978, 979, that the Supreme Court will soon grant certiorari in some such case as this and overrule precedents that fasten upon us what seems to him and me an irrational rule of presumption, obviously contrary to fact, which enables trustees in bankruptcy to employ civil actions as substitutes for criminal proceedings."

EIGHTH: In connection with the argument submitted in support of petitioner's application for a writ of certiorari three points were discussed, as follows:

A.

> There is a conflict of authority within the Circuit Court of Appeals for the Second Circuit on the question of when a trustee may rely on a presumption of continued possession resulting in the suggestion by the Circuit Court of Appeals for the Second Circuit, in its recent decisions, that this question be reviewed and finally determined by the Supreme Court of the United States.

and in support thereof petitioner's counsel cited such cases as:

Seligson v. *Goldsmith,* 128 Fed. (2d) 977, wherein Circuit Judge Learned Hand expresses the considered opinion that the Supreme Court, which has never committed itself to the presumption of continued possession, should finally determine the question and at page 979 stated as follows:

> "The Supreme Court has never committed itself to the presumption, and perhaps at some time may think it desirable finally to determine the question."

Robbins v. *Gottbetter,* 134 Fed. (2d) 843, wherein the Circuit Court expresses the view again that they were following the earlier decisions against their better judgment and, at page 844, states as follows:

> "The whole proceeding is, to the minds of us two, an abuse of the process of the Bankruptcy Court; but, until the Supreme Court, which has never really considered the matter, sees fit to change the law as it has been settled, we regard ourselves as concluded."

In re Danish v. *Sofranski,* 93 Fed. (2d) 424, wherein the same Circuit Court held that the trustee was obliged to prove not only that the respondents had wrongfully abstracted the money but how much of it they had in their hands when the Referee's order passed.

In re Schoenberg, 70 Fed. (2d) 321, where the Circuit Court of Appeals, at page 323, stated as follows:

> "But the turnover order cannot stand. A turnover order presupposes that the person against whom it is directed has possession of the property or money which he is directed to deliver up. In re Redbord, 3 F. (2d) 793 (C. C. A. 2). In the case at bar the trustee made no attempt to show what part of the merchandise originally transferred was still on hand or that the appellant had the sum of money which in the alternative it was directed to pay over."

And *In re Matter of Pinsky-Lapin & Co.,* 98 Fed. (2d) 76, which distinctly shows the conflict existing within the Circuit Court of Appeals for the Second Circuit.

These cases not only show a conflict of opinion among the Judges of the Second Circuit but also express a desire on their part that the Supreme Court should consider the question and determine it.

B.

There is a conflict of authority on the question of presumption of continued possession among several circuits on the question of law involved in the case at bar, and there should be a unanimity of opinion among the various circuits with regard to this question.

In support of this point there were cited the following cases decided in the Circuit Court of Appeals for the Second Circuit which support the presumption of continued possession:

Matter of Pinsky-Lapin & Co. (cited supra);
In re H. Magen Co., 10 Fed. (2d) 91;
In re Steinreich Associates, Inc., 93 Fed. (2d) 254.

There was also cited *Marin* v. *Ellis* (C. C. A. 8), 15 Fed. (2d) 321, which holds a contrary view to that of the Second Circuit.

There was cited *In re J. L. Marks* (C. C. A. 7), 85 Fed. (2d) 392, which holds that the burden is upon the trustee to actually prove present possession rather than rely upon a presumption of continued possession, and also *In re Samel* v. *Dodd* (C. C. A. 5), 142 Fed. 68, which followed the line of decisions that the trustee should establish possession of the property in the respondent without regard to the presumption.

C.

The Trustee did not offer any proof to show that petitioner had, at the date of the turnover order, any property of the bankrupt, although the law requires that the Trustee establish all the elements of a turnover proceeding by clear and convincing proof.

In support thereof counsel to your petitioner cited such cases as:

Oriel v. *Russell,* 278 U. S. 358, 49 S. Ct. 173;
Boyd v. *Glucklich,* 116 Fed. 131, 140;
Epstein v. *Steinfeld,* 210 Fed. 236.

NINTH: In addition to making the application for a writ of certiorari your petitioner had also filed a petition with the Referee in Bankruptcy for an order to reopen the turnover proceedings and permit testimony to be taken upon certain issues raised by the said petition. The petition, among other things, alleges that after the Circuit Court of Appeals rendered its decision your petitioner sought the advice of the firm of Morris Gotthilf & Company, certified public accountants, and Archibald Palmer, an attorney, with respect to this matter. Said accountants made a study of the proceedings and an analysis of the books and records and from said study and analysis came to the conclusion that the firm of David Berdon & Company, the accountants for the Trustee, were entirely in error when they testified that the books and records which were necessary to obtain the actual cost of the merchan-

dise sold by the bankrupt between January 1 and September 28, 1939, were missing. Morris Gotthilf, senior member of the firm of Morris Gotthilf & Company, in an affidavit submitted in support of said petition to reopen the turnover proceeding stated that it is his considered opinion that it was then and is now possible to compute the cost of the merchandise sold from the books and records which had been in the possession of the Trustee in Bankruptcy as follows:

(a) *Sales Book*—This book contains an original duplicate copy of the bill given or sent to the customers, showing in detail the information as to when the merchandise was sold, identifying the merchandise by the Union Fabrics, Inc., quality number, Union Fabrics, Inc., piece good number, the yardage sold and the sales price.

(b) *Perpetual Inventory Book*—This book contains the account of the piece goods bought and indexed by the Union Fabrics, Inc., quality number. This quality number refers to the Union Fabrics, Inc., piece goods number, the mill greige goods number, dye lot number, quantity received and quantity shipped.

(c) *Dye Book*—This book contains the following information: The name of the dyer, date returned from the dyer, name of the greige goods mill, greige goods quantity number, mill number, yardage sent to the dyer, and the finished yardage returned by the dyer. This book also indicates the shrinkage, if any, in the dyed goods.

TENTH: Your petitioner argued, through his counsel before the Referee, that if he is able to establish through the testimony of his present accountants or through the cross-examination of the accountants for the Trustee that they did have in their possession at the time of the pendency of the turnover proceedings books and records from which they could ascertain the cost of merchandise sold

during the period in question then the finding of the Referee, which was based upon the presumption that the sales price was not less than the cost, would of necessity have to be changed and the actual cost of the merchandise sold would have to be substituted for the figure based upon the legal presumption that the sales price was not less than the cost price of the merchandise sold and the burden of establishing the cost price of the goods sold would, under such circumstances, be upon the Trustee and not upon the petitioner. The amount of the turnover could under no circumstances be the same in the event the Trustee were required to establish from the books and records the cost of the merchandise sold during the period instead of relying upon the presumption afforded the Trustee by Section 21-L of the Bankruptcy Act by reason of the testimony given by the Trustee's accountants that the books and records from which the cost price of the sales could be ascertained were not available.

ELEVENTH: The Referee denied the motion to reopen the proceeding upon the ground that he had no jurisdiction to entertain such motion since petitioner had not obtained prior leave of the Circuit Court of Appeals to make said motion. An order to that effect was entered on November 29, 1944 and a copy of said order is annexed hereto and marked Exhibit A.

TWELFTH: If your petitioner's accountants are correct in the view taken by them, then the order of the Referee should be set aside and the Trustee directed to proceed to establish the allegations of his original petition de novo.

THIRTEENTH: Your petitioner is about to prepare an application to the Circuit Court of Appeals for leave to make a motion before the Referee to reopen the proceedings.

FOURTEENTH: Your petitioner, however, is informed that if this Court would entertain an application for a writ of certiorari it could settle the law as to presumptions of continued possession with respect to which the Second Circuit is in doubt and is in conflict with other circuits, and could refer the proceeding back to the Referee for the purpose of determining whether the books and records in the possession of the Trustee are sufficient from which to establish cost and if so to substitute the figure representing the cost price of the sales as actually obtained from the books and records in place and in stead of the figure included in the mathematical computation by reason of the presumption afforded to the Trustee by Section 21-L of the Bankruptcy Act.

FIFTEENTH: If the turnover proceedings are not permitted to be reopened and the Supreme Court does not allow a writ of certiorari your petitioner would have no further recourse and would be punished for contempt of Court for failure to comply with said turnover order even though your petitioner does not have and never did have the ability to comply with said order.

SIXTEENTH: Your petitioner is further informed that if a motion is made to punish him for contempt he can make no collateral attack upon the order and he could not plead as a defense that he does not and never did have the property or money referred to in the turnover order.

SEVENTEENTH: Your petitioner is of the opinion that justice will be best served not only in this matter but in other similar cases if a petition for a writ of certiorari is granted and the questions involved are considered and finally determined so that all persons who are placed in similar situations, whether they reside in the Second Judicial Circuit, Fifth Judicial Circuit, Seventh Judicial Circuit or Eighth Judicial Circuit are afforded an equal protection of the laws of this country. Under existing conditions your

petitioner is of the opinion that persons who are in a situation similar to your petitioner but who reside in the Fifth, Seventh or Eighth Circuits are afforded one type of relief, according to the interpretation of the laws of the United States in those circuits whereas citizens residing within the Second Circuit are treated differently because of a different interpretation of the same laws of the United States. Your petitioner is of the opinion that such is not the equal protection of laws guaranteed by the Constitution, particularly in a case where liberty and freedom are at stake.

WHEREFORE, your petitioner respectfully prays that this Honorable Court grant a rehearing of the writ of certiorari and upon such rehearing grant the said application.

Dated, New York, December 18th, 1944.

ABRAHAM JESKOWITZ.

CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:
STATE OF NEW YORK,

ABRAHAM JESKOWITZ, being duly sworn, deposes and says that he is the petitioner named herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

ABRAHAM JESKOWITZ.

Sworn to before me this
18th day of December, 1944.

DOROTHY J. RESNIKOF,
Notary Public,
Kings County.
Kings Co. Clk's No. 463, Reg. No. 145-R-5.
N. Y. Co. Clk's No. 527, Reg. No. 351-R-5.
Commission expires March 30, 1945.

Certificate of Counsel

I, ARCHIBALD PALMER, counsel to Abraham Jeskowitz, petitioner named in the petition for rehearing, hereby certify that the petition of Abraham Jeskowitz for a rehearing of the application for a writ of certiorari is presented in good faith and not for the purposes of delay.

Dated, New York, December 18th, 1944.

ARCHIBALD PALMER.

Exhibit A

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF UNION FABRICS, INC., Bankrupt.	In Bankruptcy No. 75326 ORDER

Abraham Jeskowitz, respondent in turnover proceedings herein, having moved this Court by order to show cause dated October 28, 1944 for an order reopening said turnover proceedings and permitting additional testimony therein and the same having come on to be heard before me on November 16, 1944 and November 21, 1944,

Now, on reading the said order to show cause, the petition of Abraham Jeskowitz, verified the 27th day of October, 1944, the affidavit of Morris H. Gotthilf, sworn to the 27th day of October, 1944, and the affidavit of Archibald Palmer,

sworn to the 27th day of October, 1944, with proof of service thereof on the attorneys for Leonard H. Carter, Trustee in Bankruptcy herein, all in support of said motion, and on reading and filing the answer of Leonard H. Carter, Trustee in Bankruptcy herein, verified the 14th day of November, 1944, in opposition to said motion, and after hearing Archibald Palmer, Esq., in support of said motion, and Parker, Chapin and Flattau and Glass & Lynch, attorneys for the Trustee in Bankruptcy herein, by Sydney W. Carle, of counsel, in opposition thereto; and due deliberation having been had thereon, upon filing the memorandum of this Court, it is

ORDERED, that said motion be and the same hereby is denied in all respects upon the ground that I, as Referee, have no jurisdiction to entertain said motion since the petitioner has not obtained the leave of the Circuit Court of Appeals, Second Circuit, to make said motion; and

FURTHER ORDERED that the stay contained in the order to show cause dated October 28, 1944 be and the same hereby is vacated in all respects.

Dated, New York, New York, November 29, 1944.

(sgd) PETER B. OLNEY,
Referee in Bankruptcy.